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10
11 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

12 United States of America,
13 Plaintiff,

14 vs.

15 James Mark Tuohy,
16 Defendant.

CR-22-01917-TUC-JCH(BGM)

17
18 MOTION TO PRECLUDE
GOVERNMENT'S EXPERT WITNESS
19 (ECF DOC. 60)

20 The government intends to call ATF Agent Michael Eldredge as an expert witness
21 to testify about the alleged improvised explosive device "IED" seized in this case. *See* Doc.
22 60. The Government seeks to introduce the opinion memorialized in the report prepared
23 and signed by Mr. Danny R. Waltenbaugh Jr. through the testimony of Mr. Eldredge. The
defense objects to the Government's request.

24 In Bullcoming v. New Mexico, 564 U.S. 647, 658–59 (2011), the Supreme Court
25 stated:
26

27 The Sixth Amendment's Confrontation Clause confers upon the
28 accused, "[i]n all criminal prosecutions, ... the right ... to be confronted with
the witnesses against him." In *Crawford* the Court held that fidelity to the

1 Confrontation Clause permitted admission of “[t]estimonial statements of
 2 witnesses absent from trial ... **only where the declarant is unavailable, and**
 3 **only where the defendant has had a prior opportunity to cross-**
 4 **examine,”** *id.*, at 59, 124 S.Ct. 1354. See *Michigan v. Bryant*, 562 U.S. 344, 354,
 5 131 S.Ct. 1143, 1153, 179 L.Ed.2d 93 (2011) (“[F]or testimonial evidence to be
 6 admissible, the Sixth Amendment ‘demands what the common law required:
 7 unavailability [of the witness] and a prior opportunity for cross-
 8 examination.’” (quoting *Crawford*, 541 U.S., at 68, 124 S.Ct. 1354)). *Melendez-*
 9 *Diaz*, relying on *Crawford*’s rationale, refused to create a “forensic evidence”
 10 exception to this rule. 557 U.S., at 317 – 321, 129 S.Ct., at 2536–2538.⁵ An
 11 analyst’s certification prepared in connection with a criminal investigation
 12 or prosecution, the Court held, is “testimonial,” and therefore within the
 13 compass of the Confrontation Clause. *Id.*, at 321 – 324, 129 S.Ct., at 2537–
 14 2540.

15 The examination and the corresponding report of the improvised explosive device
 16 “IED” seized in connection with the instant case were submitted by Danny R.
 17 Waltenbaugh Jr., Senior Explosives Enforcement Officer/Specialist of the Bureau of
 18 Alcohol, Tobacco, Firearms and Explosives. Thus, allowing the Government to introduce
 19 the report through Mr. Eldredge would violate Mr. Tuohy’s Sixth Amendment right to
 20 Confrontation.

21 Mr. Waltenbaugh’s report is an out-of-court statement. The statement is
 22 testimonial, meaning it was created solely for an “evidentiary purpose”. See *U.S. v. Melendez-*
 23 *Diaz*, 557 U.S., at 310, 129 S.Ct. 2527 cited in *Bullcoming*. The report notes that Mr.
 24 Waltenbaugh examined the physical evidence. He evaluated the materials and developed
 25 an opinion as to the design, construction, functioning, effects, and technical classification
 26 of the materials. His opinion was then memorialized in a Report of Examination. The
 27 Report was then signed by Mr. Waltenbaugh and approved by his program manager, Mr.
 28 Kenneth Erickson. See AUSA disclosure, p. 219.

1 The Government ultimately seeks to elicit the opinion that the materials involved
2 in the investigation of the case would be properly identified as an explosive bomb as
3 defined by the statutory provisions under title 26 U.S.C. § 5845(f)(1)(A) and title 18 U.S.C.
4 § 841(d), through Mr. Eldredge. However, Mr. Eldredge performed no tests nor examined
5 the alleged destructive device. He did not produce the Report of Examination regarding
6 the IED. Mr. Eldredge notes he only examined the reports regarding the case, which
7 includes Mr. Waltenbaugh's report and adopts it. See AUSA disclosure, pg. 424.
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10 Mr. Eldredge's testimony would simply extend to repeating what is on the report,
11 however, he may not respond to specific questions as to the testing or evaluation of the
12 physical evidence. Allowing Mr. Eldredge to testify would hinder Mr. Tuohy's ability to
13 question the reliability of the tests conducted to examine the device and question the
14 expert on other factors he could or should have considered at the time of examining the
15 physical evidence. Mr. Eldredge cannot answer these questions.
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17 For the Government to introduce Mr. Waltenbaugh's opinion testimony through
18 Mr. Eldredge it must, first, show that the declarant (Mr. Waltenbaugh) is unavailable and,
19 second, to have afforded Mr. Tuohy a prior opportunity to cross-examine him. The
20 Government has not complied with this mandate. It has not asserted nor certified that
21 Mr. Waltenbaugh is unavailable as a witness, nor has it afforded an opportunity for Mr.
22 Tuohy to confront this expert regarding his report and how he arrived at his expert
23 opinion.
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25
26 The Supreme Court was clear that: "the Confrontation Clause does not tolerate
27 dispensing with confrontation simply because the court believes that questioning one
28

1 witness about another's testimonial statements provides a fair enough opportunity for
2 cross-examination.” Thus, allowing Mr. Eldredge to testify in lieu of Mr. Waltenbaugh
3 would violate Mr. Tuohy’s right to confrontation.
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5 Mr. Tuohy respectfully moves this Court to preclude the Government from
6 allowing the testimony of ATF Agent Michael Eldredge as an expert witness.

7 RESPECTFULLY SUBMITTED: July 24, 2023

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